No. 88-441

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1988

CHARLES J. KOZAKIEWICZ, GARY KNOTTS
and EDWARD DeSABATO,

Petitioners,

vs.

TERRY A. BORING, ANDRE CALHOUN, WELDON
FELLS, DALE E. GEIDEL, RONALD PERRY,
and DAVID BEATTY

Respondents.

**RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Lynn J. Alstadt
322 Boulevard of the Allies, Suite 500
Pittsburgh, Pennsylvania 15222
(412) 471-1593
Attorney for Respondents

Michael L. Dever
322 Blvd. of Allies
Pittsburgh, PA 15222
(412) 471-1593
Of Counsel

Thomas R. Shaffer
5 East Third Street
Coudersport, PA 16915
(814) 274-7292
Of Counsel

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STATEMENT OF THE FACTS

This is the second time that the Court has received a petition for certiorari in this prisoner's civil rights case. On February 8, 1988, the prisoner plaintiffs petitioned for a writ of certiorari to the Court of Appeals for the Third Circuit to review a split decision of that Court concerning the substantive due process rights of pretrial detainees. That petition was denied on April 11, 1988.

The present petition asks this Court to review a unaminous, two paragraph affirmance of an award of costs by the District Court. Such an award was reasonable and within the discretion of the District Court.

This is one of many prisoner civil rights cases which have been filed pro se in the District Courts. The District Court for the Western District of Pennsylvania has been flooded with such pro se complaints after its decision in Inmates of Allegheny County v. Pierce, 457 F.Supp. 984 (W.D. Pa., 1978), aff'd. in part and rev'd in part 612 F.2d 754 (3rd Cir. 1979). In that case the Court ruled that the condition of the Allegheny County Jail in Pittsburgh, Pennsylvania in 1975-76 violated the Constitutional rights of the inmates. Most of the pro se complaints were poorly drafted and often the procedural rules of the Court had not been followed. Some of the complaints were filed by several plaintiffs. In multiple plaintiff complaints, the inmates often refused to designate a single spokesman for the

group. Each prisoner wanted to attend every conference and other proceedings concerning his case.

The District Court wanted to assure that every complaint was carefully considered and that no complaint was summarily dismissed. Yet, the pro se complaints were often difficult to understand and the Court was reluctant to speak to the plaintiff in order to learn the inmate's precise complaint. Furthermore, the Court did not want to bring every inmate in a multiple party complaint to every court proceeding unless it was absolutely essential to do so.

On April 28, 1981, the District Court sent a plea to area law firms for counsel to accept the more complicated and possibly meritorious cases on a pro bono basis. One of those requests was directed to the eight lawyer patent law firm of Buell, Blenko, Ziesenheim & Beck. Lynn J. Alstadt of that firm answered the call and volunteered for an appointment.

Before any appointments were made, the Court sponsored a one day seminar about prisoner civil rights cases. Mr. Alstadt attended the program and was told that an incentive for participating in the program is the provision for an award of counsel fees to successful plaintiffs pursuant to 42 U.S.C. §1988.

On January 14, 1982, Mr. Alstadt was appointed as counsel to the plaintiffs. Two weeks later he began his review of the Court files for the case and met with two of the plaintiffs. To his surprise, Mr. Alstadt discovered that 41

documents regarding this case, which took over five hours to review, had been filed before his appointment.

Immediately after his appointment, Mr. Alstadt undertook to prepare a Third Amended Complaint at the request of the magistrate and with the agreement of defense counsel, setting forth precisely the issues and parties involved in the case. That complaint listed 9 plaintiffs and 44 defendants and 21 causes of action. The drafting of this complaint necessarily involved a review of the Court's file on this case, legal research, and numerous meetings and discussions with the individual plaintiffs. Several drafts of this complaint were made in an attempt to precisely state the claims made in the two previously filed complaints and numerous affidavits as well as the information received from the clients.

Plaintiffs were indigent and unable to pay the out-of-pocket non-taxable expenses such as postage, photocopying and travel associated with meeting with the plaintiffs at the Western Penitentiary in Pittsburgh where some of the plaintiffs were then housed. Although the plaintiffs requested assistance from the Court for out-of-pocket expenses, the Court was unable to provide any assistance to the plaintiffs.

Despite these obstacles, six of the plaintiffs were able to prevail against defendants, Warden Charles Kozakiewicz, Deputy Warden Gary Knotts and Jail Administrator Edward DeSabato who had principal responsibility for the conditions and events at the

Allegheny County Jail which prompted the complaint.[1] Because of the difficulty in assessing actual money damages for the deprivation of constitutional rights for the imprisoned plaintiffs, the jury awarded each of the prevailing plaintiffs nominal damages. The amount of the award is in no way a measure of the complexity of the case or the value of the services rendered by plaintiffs' attorneys.

Subsequent to the trial, plaintiffs filed a Motion Requesting Costs. This Motion, which, pursuant to 42 U.S.C. §1988, included attorney's fees, included a complete and detailed summary of the taxable costs incurred by plaintiffs during the course of the litigation and the time expended by plaintiffs' counsel in this matter. Plaintiffs sought $89,312.43 in costs.

After a series of response briefs and reply briefs by both plaintiffs and defendants, including Plaintiffs' Motion for Extension of Time to Request Attorneys Fees, the Honorable Glenn E. Mencer issued an Order and Memorandum opinion awarding plaintiffs $41,764.47 in costs. In justifying this award, Judge Mencer commented that counsel "vigorously and skillfully fought for the plaintiffs' interests". Judge Mencer fully considered and commented on every argument raised by defendants in their briefs to the Court regarding the award of costs.

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1. Two of the plaintiffs, Philip Meighan and Prentiss Johnson, did not prevail against the defendants. Counsel for plaintiffs were unable to locate Philip Meighan once he had completed serving his prison sentence. Prentiss Johnson attended the first day of the trial but became ill and asked to be excused. Consequently, he failed to testify at the trial regarding the conditions as the Jail through which he suffered.

On February 8, 1988, the prisoner plaintiffs petitioned for a writ of certiorari brought by plaintiffs to the Court of Appeals for the Third Circuit was docketed and given the designation No. 87-6529. This petition, which concerned an Opinion of the Court of Appeals for the Third Circuit regarding the substantive aspects of plaintiffs' case, was ultimately denied on April 4, 1988.

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States makes clear that a review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Plaintiffs respectfully submit that there are no special and important reasons for granting defendants' petition.

In granting plaintiffs' request for costs, the Honorable Glenn E. Mencer properly exercise his discretion. Judge Mencer determined that plaintiffs' success was limited. He also determined that plaintiffs' counsel vigorously and skillfully fought for the plaintiffs' interests. Judge Mencer reviewed the itemized list of costs and decided against the application of a multiplier. Judge Mencer examined the particular entries listed in Schedule D to Plaintiffs' Motion Requesting Costs and withdrew those which he thought were excessive. In all, Judge Mencer awarded plaintiffs costs in an amount which, in his discretion, was consistent with the degree of plaintiffs' success at trial.

Defendants have raised several objections to the discretionary decisions of Judge Mencer. However, each of these objections criticizes a factual determination or exercise of discretion made by Judge Mencer. Defendants' objections do not provide special and important reasons for granting a writ of certiorari.

- I -

The first issue raised by defendants is whether an award of One Dollar by the plaintiffs against some, but not all, of the defendants entitles the plaintiffs as a "prevailing party" to recovery of all attorney fees as costs. Judge Mencer, and the Third Circuit agreed with defendants that the answer is no. Plaintiffs are not entitled to all of their attorney fees as costs and were not awarded all of their attorney fees as costs. Instead, an award of attorney fees as costs which was consistent with plaintiffs' degree of success was ordered by Judge Mencer at his discretion.

Defendants' attempts to raise this issue begs the question upon which defendants' appeal, as well as their petition for a writ of certiorari, is based. That question is whether the award of attorney's fees as costs reflects the degree of success achieved by plaintiffs. The answer to this question is yes.

This Court has set a rule to be followed in determining whether a fee reduction is proper. In Hensley v. Eckerhart, 461 U.S. 424, 436 (1938) for the following rule:

> "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claim, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fees reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Inmates of Allegheny County, supra at 180."

In the present case, the plaintiffs objected to the general totality of conditions existing at the Allegheny County Jail during their incarceration. In addition, the plaintiffs objected to various specific conditions which constituted that totality. The interrelatedness of the specific conditions of confinement to the general totality of conditions is obvious. Plaintiffs' objections regarding medical treatment, contact visitations, religious services, meals, access to the law library, access to telephones and the composition of the disciplinary boards, as well as their other objections all constitute the general totality of conditions existing at the Allegheny County Jail. All of these factors were under the direct control of the defendants against whom the jury made its award.

The jury decided that the general totality of conditions that existed at the Allegheny County Jail violated the constitutional rights of the plaintiffs who were incarcerated

therein.[2] The claims which were not individually brought before the jury were nevertheless so intertwined with and overlapped the issues on which the plaintiffs prevailed that no fee reduction should be made in this case.

Judge Mencer presided over the trial and experienced first hand the amount of success achieved by plaintiffs. Based on his familiarity with the action and personal knowledge of the pertinent facts, Judge Mencer acted properly within his discretion in awarding attorney fees as costs to plaintiffs. This exercise of discretion by Judge Mencer does not provide special and important reasons for granting a writ of certiorari.

- II -

The second issue raised by defendants is whether a local rule of court regarding attorney fees preempts a motion for costs pursuant to 42 U.S.C. §1988. The answer to this question is no.

Plaintiff's request for costs, including attorneys' fees, was timely filed. Rule 54(d) of the Federal Rules of Civil Procedure provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs..." Unless so defined by statute, attorneys' fees are not generally considered "costs"

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2. At the insistance of counsel for defendants, plaintiffs' proposed special interrogatories to the jury were not used. Instead, the jury had before it only a general verdict slip.

taxable under Rule 54(d). Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 249 (1975)

Section 1988 of Title 42 of the United States Code states in relevant part as follows:

> ". . . In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 U.S.C. §§1981-1983, 1985, 1986], . . . the Court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

This statute by its plain language establishes that attorney fees are to be considered as costs. This statute, by its requirement of judicial discretion, also provides an exception to the general rule that costs are allowed as of right.

Plaintiffs brought their motion requesting costs 43 days after final judgement in this case. Since the Western District of Pennsylvania has no local rule which sets a time limit on the application of requests for costs, the only requirement that such an application must meet is that the request for costs must not be so untimely as to cause unfair prejudice to the defendant. United States v. Pinto, 44 F.R.D. 357 (W.D. Mich. 1968). As determined by Judge Mencer, plaintiffs' request does not create unfair surprise or prejudice.

In Marek v. Chesny, 473 U.S. 1, 105 S.Ct. 3012 (1985), this Court followed a "plain meaning" analysis in interpreting 42 U.S.C. §1988 as it relates to Rule 68 of the Federal Rules of Civil Procedure. In Marek, the plaintiff brought a civil rights action against the defendant. Before trial, the defendant made an offer of judgment pursuant to Rule 68. The plaintiff refused

the offer, and subsequently was awarded a judgment that was less than that which the defendant offered. The plaintiff then submitted a request for costs which included both pre-offer and post-offer attorney fees.

This Court held that because the plain meaning of Section 1988 provides that a prevailing party may be awarded attorney fees as part of the costs, an award of attorney fees to the prevailing party in a civil rights action is subject to the cost-shifting provision of Rule 68. Using this plain meaning analysis, this Court reasoned that the plaintiff was not entitled to an award of post-offer attorney fees.

Plaintiffs respectfully submit that, under the plain meaning of 42 U.S.C. §1988 as set forth by this Court, a prevailing party in a civil rights action may recover his costs, including attorney fees, by filing a motion requesting costs. This is precisely what plaintiffs have done in this case. Because the provision of Local Rule 33 do not apply to motions requesting costs, Local Rule 33 cannot bar plaintiffs' present Motion Requesting Costs.

The purpose behind local rules setting deadlines for motions for costs and motions for attorney fees is to prevent undue surprise or prejudice from adversely affecting the party against whom the motions were raised. In the absence of such prejudice or surprise, the Court, in its discretion, can decide this amount, if any, of costs or attorney fees to be awarded.

Judge Mencer in his Memorandum Opinion expressly found that defendants were not subjected to any unfair surprise or

prejudice. (Appendix, p. 7a). Because of this lack of surprise and prejudice, Judge Mencer used his discretionary powers and entered an order awarding costs to plaintiffs. Such a use of discretionary power does not provide special and important reasons for granting a petition for a writ of certiorari.

In this regard, it is important to note that plaintiffs' Motion for an Extension of Time to File a Request for Attorney Fees is still pending before Judge Mencer. In light of Judge Mencer's finding in the Memorandum Opinion that defendants were not subject to any unfair surprise or prejudice, it is extremely likely that Judge Mencer would grant this motion if the Judgment Order of the Third Circuit was eventually reversed by this Court. Such an action by Judge Mencer would be within his discretionary power and consistent with the action he has taken regarding plaintiffs' request for costs.

- III -

The final issue raised by defendants is whether an evidentiary hearing is required regarding the appropriateness of certain fees claimed under 42 U.S.C. §1988. The answer to this question is no.

Section 1988 provides that the District Court, in its discretion, may allow the prevailing party, a reasonable attorney's fee as part of the costs." This is precisely what the District Court did. The Court fully considered the arguments set

forth in defendants' memoranda and in plaintiff's memoranda. After a reasoned deliberation on the arguments, the Court concluded that plaintiffs, as prevailing party, were entitled to costs.

The Memorandum Opinion prepared by Judge Mencer reveals that Judge Mencer examined plaintiffs' Costs Schedules. Judge Mencer considered the degree of success achieved by plaintiffs in determining the amount of the award. Judge Mencer reviewed the individual entries and withdrew those for services which did not merit compensation. Judge Mencer also limited the award to the services reasonably necessary to the case.

In his Memorandum Opinion, Judge Mencer commented on the vigorous and skillful fight waged by plaintiffs' counsel. By his own familiarity with the case, he considered the novelty and complexity of the questions presented. He understood the time limitations imposed by circumstances and the undesirability of accepting a case under an appointment. In all, Judge Mencer fully considered the factors listed in defendants' petition.

Judge Mencer properly exercised his discretion in decreasing plaintiffs' denial by over $47,500.00 in ordering an award of costs. Judge Mencer's determination of attorney fees reflects the proper use of his discretionary authority. Such use of discretionary power does not provide special and important reasons for granting a petition for a writ of certiorari.

CONCLUSION

Defendants Petition for Writ of Certiorari should be denied.

Dated September 29, 1988

Respectfully submitted,

Lynn J. Alstadt
322 Boulevard of the Allies
Pittsburgh, PA 15222
(412) 471-1593

Attorney for Plaintiffs

Of Counsel:

Thomas R. Shaffer
5 East Third Street
Coudersport, PA 16915
(814) 274-7292

Michael L. Dever
322 Boulevard of the Allies
Pittsburgh, PA 15222
(412) 471-1593